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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network	)	
Information and Other Customer Information	)	

RESPONSE TO PETITIONS FOR RECONSIDERATION OF INTERMEDIA COMMUNICATIONS INC.

Jonathan E. Canis
Melissa M. Smith
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

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SUMMARY

Contrary to several commenters' assertions in the Petitions for Reconsideration filed in response to the Commission's *Second Report and Order*, the CPNI rules are not adequate to ensure that ILEC "winback" campaigns do not thwart the development of local competition. In order to prevent ILEC misuse of CPNI, the Commission should issue rules that require strict separation of ILEC presubscription, retail, and wholesale activities. Additionally, the Commission should establish enforcement mechanisms to ensure ILEC compliance.

ILEC CPNI is different in kind than competitor CPNI; that is, ILECs have unparalleled access to CPNI and a strong incentive to misuse the CPNI of CLEC customers received through ILEC wholesale operations. Armed with this vast array of CPNI, the ILECs are attempting to "winback" customers, thereby impeding the development of local competition. A closely related problem is the Commission's decision to permit BOC section 272 affiliates to access the BOC parent company's CPNI. Not only does this decision violate the 1996 Act, but it also gives BOC affiliates an unfair advantage over competitors. To remedy this situation, the Commission must adopt rules that prevent ILECs from using CLEC customer lists for any retail activity, marketing or non-marketing.

Further, the computer system modification requirements mandated in the *Second Report and Order* are burdensome and unnecessary. Rather than burdening competitive carriers, the Commission should permit carriers to devise their own solutions to comply with the CPNI rules. Finally, *Computer III* waivers should not be permitted to satisfy the Commission's new section 222 rules. Indeed, waivers obtained under *Computer III* would not, in the majority of

cases, satisfy the Commission's section 222 "informed approval" standard. Accordingly, the Commission should require ILECs to obtain express approval as set out in section 222.

TABLE OF CONTENTS

Before the
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In The Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
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RESPONSE TO PETITIONS FOR RECONSIDERATION OF INTERMEDIA COMMUNICATIONS INC.

Intermedia Communications Inc. ("Intermedia"), by its undersigned attorneys and pursuant to 47 C.F.R. § 1.429(f), hereby submits its Opposition to certain aspects of several Petitions for Reconsideration filed in response to the Commission's *Second Report and Order* in the above-captioned docket.[1] Specifically, Intermedia objects to the position that all telecommunications carriers, including ILECs, should be able to use CPNI to "winback" customers.[2] To the contrary, Intermedia submits that competition in the local marketplace has not yet taken hold. Thus, the Commission must adopt rules that ensure that ILEC "winback" campaigns do not thwart the development of local competition through the misuse of CPNI and other CLEC customer information possessed by ILECs.

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1 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27 (rel. Feb. 26, 1998) ("*Second Report and Order*"). Notice of the *Second Report and Order* appeared in the *Federal Register* on April 24, 1998. Notice of the Petitions for Reconsideration appeared in the *Federal Register* on June 10, 1998.

2 *See, e.g.,* SBC Petition at 8-9; GTE Petition at 32-38; Bell Atlantic Petition at 16-20; BellSouth Petition at 16-18; AT&T Petition at 2-5.

In addition, Intermedia concurs with commenters who note that the computer system modification requirements outlined in the *Second Report and Order* are extremely burdensome and unnecessary. Even ILEC commenters agree that the electronic audit requirements, for example, are wholly unnecessary.[3] Further, Intermedia submits that the Commission's decision to allow BOCs to transfer CPNI to their interLATA section 272 affiliates not only violates the plain language of the 1996 Act[4] and reverses an earlier Commission decision, but also gives BOC affiliates an unfair competitive advantage. Clearly, this result was not intended by Congress when it enacted section 272. Finally, Intermedia submits that neither the BOCs nor GTE should be permitted to use *Computer III* waivers to satisfy the Commission's new section 222 rules, as the *Computer III* waivers were not obtained through the informed consent requirements of the new CPNI rules.

I. THE COMMISSION'S RULES FAIL TO PROTECT ADEQUATELY CLEC CPNI FROM ILEC WINBACK EFFORTS

As Intermedia has stated in its comments in this proceeding, ILECs have unparalleled access to CPNI and a tremendous incentive to misuse the CPNI of CLEC customers, which the ILECs receive through their wholesale operations. As the monopoly provider of unbundled network elements and resale services, ILECs possess CPNI of essentially every CLEC customer. The Commission should, at a minimum, clarify that the ILECs must maintain a

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3 *See, e.g.,* Ameritech Petition at 8-11; BellSouth Petition at 18; Bell Atlantic Petition at 22.

4 Communications Act of 1934, as amended, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et. seq ("1996 Act" or "Act").

bright-line separation between the ILEC wholesale and retail activities, such that no CLEC CPNI may pass from the ILEC wholesale unit to the ILEC retail unit.

A. The Commission's rules inadequately protect competitor CPNI from ILEC winback campaigns

Intermedia contends that, contrary to the position of the ILECs, the Commission's CPNI rules do not go far enough to safeguard local competition. As competition increases, ILECs will have more of an incentive to attempt to use the CPNI of competitors in order to winback former ILEC customers. The ability to contact former customers is made possible by an ILEC's position as retailer, wholesaler, and maintainer of presubscription databases.

In the local exchange marketplace, CLECs are unavoidably dependent upon their competitors, the ILECs, for facilities and services, such as unbundled loops. Through this relationship, the ILECs receive information on every CLEC customer. In its Petition, Frontier suggests that the Commission should "prohibit the use of *any* information derived solely from the provision of carrier-to-carrier services in win-back campaigns, particularly when an incumbent local exchange carrier establishes win-back programs that appear to be able to be successful solely because of the use of this information."[5] Intermedia agrees that the Commission must adopt rules that prohibit the ILECs from using CPNI and other CLEC customer information to regain the business of a customer who has switched to a competitive service provider.

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[5] Frontier Petition at 9.

B. The Commission's *Clarification Order* has further opened the door to ILEC abuse of CLEC CPNI and customer information

In its *Clarification Order*,[6] the Commission may have unintentionally sanctioned ILEC misuse of CLEC customer information obtained through ILEC wholesale operations. Specifically, the Commission noted that it does not consider "a customer's name, address, and telephone number to be 'information pertaining to telephone exchange or telephone service'" within the meaning of section 222(f)(1)(B).[7] While this may be true for an ILEC's retail customers, the name, address, and telephone number of a CLEC's customers is proprietary and must receive CPNI protection. The Commission's failure to distinguish between ILEC wholesale and retail activities puts confidential CLEC customer information at risk, and essentially allows ILECs unbridled access to CLEC customer lists for winback campaigns.

To date, the Commission has failed to issue rules that adequately protect CLEC CPNI in the hands of ILECs, and the Commission has made matters worse by stating that customer names, addresses, and telephone numbers are not CPNI, thus giving the impression that ILECs may use CLEC customer list information for any purpose whatsoever. This result clearly is anticompetitive and should be countered with bright-line safeguards to promote competition and prevent ILECs from using CLEC customer lists for any retail activity, marketing or non-marketing.

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6 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order, DA 98-971 (May 21, 1998) ("*Clarification Order*").

7 *Id.* at ¶ 9.

C. The Commission should adopt bright-line rules to protect competitor CPNI from ILEC abuse

The Commission should issue straightforward safeguards and enforcement mechanisms to protect CLEC customer information and CPNI. As for safeguards, the Commission should mandate that ILECs maintain a bright-line separation between ILEC presubscription operations, retail operations, and wholesale operations. The ILECs presently maintain separate systems, and the Commission should ensure that the ILECs continue to maintain separate systems. This firewall approach should include a proscription against transferring data among systems and among the account representatives that maintain the different systems. As for enforcement, the Commission should treat ILEC winback campaigns that misuse CPNI similar to interexchange carrier slamming, and issue notices of apparent liability and per-violation fines if a carrier can establish that misappropriated CPNI has been used in an effort to winback customers or for other anticompetitive purposes.

At a minimum, the Commission should clarify that CPNI protections apply to all CLEC customer information – service records, names, addresses, etc. – that ILECs obtain through their wholesale operations. To this end, Intermedia supports, as enhanced, Frontier's assertion that the Commission should modify section 64.2005(b)(5) of its rules by adding:

> An incumbent local exchange carrier may not use [any] information [– including customer name, address, and telephone number –] derived solely from the provision of carrier-to-carrier services, including the identity of the competitor, to regain the business of the customer who has switched to another service provider.[8]

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[8] Frontier Petition at 10 (bracketed text added).

Frontier's language, along with Intermedia's enhancements, will clarify that ILECs may not use any information obtained through their wholesale activities to support retail service marketing. As noted, CLECs have no choice but to provide ILECs with customer-specific information in purchasing unbundled network elements and resale service. The Commission should not permit this competitive necessity to become a source of anticompetitive attempts to thwart CLEC efforts to provide telecommunications services.

II. THE COMMISSION'S DECISION TO PERMIT BOC SECTION 272 AFFILIATES TO ACCESS THE BOC PARENT COMPANY'S CPNI VIOLATES THE PLAIN LANGUAGE OF THE ACT AND GIVES BOC AFFILIATES AN UNFAIR COMPETITIVE ADVANTAGE

In order to guard against BOC discrimination in favor of section 272 affiliates, Congress broadly defined the BOCs' non-discrimination obligations with respect to their affiliates in section 272(c)(1). Unfortunately, the Commission's CPNI rules have gutted the nondiscrimination provision of section 272(c)(1) by permitting BOCs to transfer CPNI to 272 affiliates without restriction. These rules violate the plain language of the Act and give BOC affiliates an unfair competitive advantage over unaffiliated carriers.

A. The Commission's rules regarding CPNI sharing with section 272 affiliates violate the plain language of the Act

In the *Second Report and Order*, the Commission concluded that sections 222 and 272 are incompatible.[9] The Commission has attempted to cure this supposed conflict by taking CPNI out of the definition of "information" in section 272, thereby contradicting the plain language of section 272 and reversing the Commission's earlier conclusion in the *Non-*

[9] *Second Report and Order* at ¶ 158.

Accounting Safeguards Order. In so doing, the Commission has given BOC affiliates an unfair advantage over other competitive carriers.[10]

Section 272(c)(1) states that a BOC "may not discriminate between [the BOC] affiliate and any other entity in the provision or procurement of goods, services, facilities, and *information*, or in the establishment of standards."[11] CPNI is defined as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service...."[12] Under the Act, then, CPNI is "information" that falls squarely within the category of "information" in section 272(c)(1).

This conclusion follows simply from the plain language of section 272. Unlike other places in the Act,[13] there is no limiting language in section 272 that would suggest that the word "information" does not include CPNI. In fact, in section 272(g), Congress expressly limited the non-discrimination requirements by exempting joint marketing from section 272(c)(1). There is no such exemption for CPNI. Both the existence of an exemption for something other than CPNI and this conspicuous absence of language limiting the type of "information" suggests strongly that Congress intended a broad definition of the term in order to prevent the BOCs from discriminating in favor of their interLATA affiliates.

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10 Moreover, MCI points out that there was no notice of the possibility that the Commission might reverse its earlier decision that "information" that must be provided in a non-discriminatory manner under section 272(c)(1) includes CPNI. *See* MCI Petition at 6-7.

11 47 U.S.C. § 272(c)(1) (emphasis added).

12 47 U.S.C. § 222(f)(1).

13 *See, e.g.*, section 251(c)(5), which establishes an ILECs duty to provide competitors with only the sort of "information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks"; section 272(e)(2) applies only to "information concerning [a BOC's] provision of exchange access"; and section 273(c)(4) requires BOCs to provide interconnecting carriers with "information on the planned deployment of telecommunications equipment."

Moreover, the Commission previously has found that "information," for the purposes of section 272, includes CPNI. In the *Non-Accounting Safeguards Order*, the Commission found that section 272's non-discrimination requirement, with respect to the BOCs' provision of "information," includes CPNI. In that Order, the Commission specifically addressed the word "information" and concluded that there was "no limitation in the statutory language on the type of information that is subject to the section 272(c)(1) non-discrimination requirement."[14] Accordingly, separate and in addition to section 222, the BOCs must comply with section 272 when providing CPNI to their interLATA affiliates.

Several commenters have recognized that allowing the BOCs to share their customers' local CPNI with their interLATA affiliates without customer consent contradicts Congress' intent and eliminates the section 272 safeguards, which Congress enacted to constrain the BOCs' unfair use of their power in the local market.[15] Indeed, Commissioner Ness has recognized that this sharing of information "undermines the [Section 272] structural separation safeguards crafted by Congress."[16] Sections 222 and 272 can co-exist without hindering competition simply by requiring BOC interLATA affiliates to obtain written customer consent prior to obtaining the local CPNI of that customer.[17]

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14 *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 2297 at ¶ 222 (1996) ("*Non-Accounting Safeguards Order*"), Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Report and Order, 12 FCC Rcd 15756 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies, et al. v. FCC, et al.* No. 97-1432, 1997 WL 783993 (D.C. Cir. 1997), *further recon. pending.*

15 *See* AT&T Petition at 23-24; Sprint Petition at 6-8.

16 Statement of Commissioner Ness, Dissenting in Part at 1.

B. The Commission's rules regarding CPNI sharing with section 272 affiliates give BOC affiliates an unfair advantage over other competitors

As explained above, the BOCs have access to the CPNI of most every customer in their service areas, including their competitors. Indeed, "[c]ompetitors only have access to CPNI related to the services to which their immediate customers subscribe, but under the Commission rules, BOC 272 affiliates have access to the CPNI of their immediate customers and to the universe of BOC local exchange customers."[18] By passing this information to their affiliates, the BOCs provide their affiliates with information that simply is unobtainable by other carriers, thus giving the BOC affiliates a decided competitive advantage. This results thwarts the purpose of section 272, which is designed to ensure that BOC affiliates do not obtain an unfair advantage over unaffiliated competitors.

To counteract this information advantage, the Commission should enforce the plain language of section 272(c)(1). Competitive carriers have to gather CPNI waivers from their customers, and BOC affiliates should be required to do the same. Section 272 affiliates should not obtain an information advantage by virtue of their association with the BOCs.

(...continued)

[17] *Id.* at 2.

[18] CompTel Petition at 8.

III. THE COMMISSION'S COMPUTER SYSTEM MODIFICATION REQUIREMENTS WILL UNDULY BURDEN COMPETITIVE CARRIERS WITHOUT OFFERING ANY CORRESPONDING BENEFIT TO CONSUMERS

The computer systems modifications introduced for the first time in the *Second Report and Order* are not only burdensome and unnecessary, but also were inadequately noticed by the Commission. Moreover, the new computer enhancement rules expand the Commission's "regulatory oversight far into the minutia of a competitive carrier's activities to require overhaul of practically every internal system used by a competitive carrier."[19] Given the cost and significance of these new burdens and the clear lack of adequate notice, the Commission should reconsider the computer upgrade rules issued in the *Second Report and Order*.

A. The Commission inadequately noticed its computer systems rules, and no record basis exists for promulgating these rules

In the *NPRM* in this docket,[20] the Commission tentatively concluded that it would not "specify [computer system] safeguard requirements for all other telecommunications carriers."[21] In fact, the Commission specifically noted that it intended to develop a record on the issue of systems modifications.[22] Then, in the *Second Report and Order*, the Commission announced its rules requiring massive computer modifications for all competitive carriers. This

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19 LCI Petition at 2.

20 *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Proprietary Network Information and Other Customer Information,* Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) ("*NPRM*").

21 *NPRM* at ¶ 36.

22 *Id.*

unexpected jump was accomplished with barely a modicum of notice or meaningful input from carriers that would be most affected by the requirements.

Between the release of the *NPRM* and the *Second Report and Order*, the only input that the Commission considered was five *ex parte* presentations submitted outside of the Commission's filing schedule by carriers that would not even have to face the burdens now faced by most competitive carriers.[23] Indeed, AT&T and the other BOCs that submitted the *ex parte* presentations, unlike the rest of the competitive carriers affected by the rules, have been subject to the Commission's CPNI rules, and corresponding systems requirements, for many years.[24] With systems already developed and in place, these carriers are clearly not representative of competitive carriers, like Intermedia, that would be required to implement entirely new systems under the rules. Thus, the Commission did not have the information that it needed to make a logical, informed decision concerning the burdens that would be faced by the majority of competitive carriers under the rules.

In addition, five *ex parte* presentations do not constitute adequate notice considering the massive scale of the computer modifications. In the *NPRM*, the Commission expressly stated that it would not specify computer system requirements for competitive carriers. While it is true that comments may influence the Commission to modify its original notice proposal if the conclusion is a "logical outgrowth" of the original proposal, comments cannot cure inadequate notice. Here, the Commission failed to properly notify competitive carriers of the monumental task they must undergo to reconfigure their existing computer systems. Prior to

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23 *Second Report and Order* at nn. 689 and 692.

24 LCI Petition at 5.

the appearance of the final rules, carriers had absolutely no opportunity to comment on the costs and alleged benefits of the computer systems modifications.

B. The new computer system modification rules will impose a new layer of artificial, regulatory burdens on competitive carriers

The Commission's CPNI rules impose significant burdens on competitive carriers.[25] In its Petition, LCI details the modifications it would have to implement in order to comply with the requirements of the *Second Report and Order*.[26] The implementation process described by LCI with respect to identifying and tracking CPNI data is typical of the modifications that competitive carriers would have to implement to comply with the Commission's new rules. Internal data systems would have to be modified to "(1) flag that information which relates to the quantity, technical configuration, type, destination or amount of use of a [carrier's] services, (2) identify the category or class of service(s) (*e.g.*, interexchange, local, or wireless) to which the customer subscribes, (3) record whether a customer has granted authorization to use CPNI, (4) note any partial or conditional authorizations given, (5) update the consent information when a customer changes or revokes authorization, and (6) revise the screen appearance to conspicuously display[] [the CPNI flag] within a box or comment field within the first few lines of the first computer screen."[27]

As several commenters point out, these extensive and costly system reconfigurations are entirely unnecessary. The goals of the Commission could be accomplished

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25 *See, e.g.*, TDS Telecom Petition at 11-16; ALLTEL Petition at 8-9; NTCA Petition at 7-11; Frontier Petition at 3-5; Sprint Petition at 2-6.

26 LCI Petition at 4.

27 *Id.*

in much less burdensome ways. For example, a competitive carrier could establish an internal team that would monitor prospective marketing campaigns in order to ensure CPNI rule compliance, or obtain customer consent pursuant to Section 222(d)(3) for use of customer information during inbound calls.[28] Alternatively, carriers could simply devise their own record keeping systems and rely on the Commission's complaint procedures to ensure compliance. This way, carriers would not have to implement costly computer system upgrades or drain the existing pool of resources earmarked for other systems requirements.[29]

Moreover, the Commission's rules fail to recognize that the original *Computer III* systems modification requirements were designed to protect – not burden – competitors. As noted in the *Second Report and Order*, "the Commission adopted the *Computer III* CPNI framework, together with other nonstructural safeguards, to protect independent enhanced services providers and CPE providers from discrimination by [ILECs]."[30] While *Computer III* systems requirements were designed to protect competitors, the Commission is now applying these rules to competitors, which will serve only to increase the cost of providing competitive service. The record contains no evidence suggesting that requiring CLECs to implement computer systems changes would in any way benefit consumers, and thus the Commission should reconsider its rules requiring CLECs to modify their computer systems.

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28 LCI Petition at 6.

29 Implementation of CPNI systems modifications will take valuable resources away from other projects, such as the Year 2000 problem and interconnection issues. *See, e.g.*, Sprint Petition at 2-6.

30 *Second Report and Order* at ¶ 174.

IV. THE COMMISSION'S CLARIFICATION ORDER ERRONEOUSLY ALLOWS ILECS TO RELY ON *COMPUTER III* CPNI AUTHORIZATIONS

As noted in the *Second Report and Order*, the Commission historically has required the BOCs and GTE to issue CPNI notification statements and obtain CPNI waivers from certain customers for enhanced services.[31] As noted previously, the *Computer III* CPNI safeguards were implemented primarily to protect competitive enhanced service providers from discrimination by the BOCs and GTE. However, contrary to the pro-competitive roots of the *Computer III* CPNI safeguards, the Commission's new rules permit incumbents to rely on *Computer III* CPNI waivers even though many of these waivers do not comport with the "informed consent" requirements of the Commission's new CPNI rules.

Computer III CPNI requirements are fundamentally different from section 222 CPNI requirements. For example, the new rules require carriers to provide a written notice to customers indicating that their service will not be affected by refusing to sign a CPNI waiver. Moreover, notice under section 222 must "precede" and be "proximate to" a customer's CPNI waiver. Many of the *Computer III* waivers pre-date the 1996 Act, and, as the Commission knows, the 1996 Act conferred many new rights on consumers and made many new types of competitive services available to consumers. Given the dramatic regulatory changes that have occurred since the enactment of the 1996 Act, it seems impossible that stale *Computer III* waivers could meet the "informed approval" standard for CPNI waivers set by the Commission in implementing section 222.

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[31] *Id.*

Assuming, *arguendo*, that the Commission does permit ILECs to use *Computer III* waivers to market enhanced services under section 222, the Commission should clarify that only those waivers obtained in writing qualify. Under the *Computer III* rules, the Commission required the ILECs to obtain express, written approval only from business customers with over 20 lines to market enhanced services.[32] Business customers with 20 or fewer lines and residential customers were required to inform affirmatively the ILECs to limit ILEC use of CPNI. In other words, the ILECs obtained "waivers" by negative option from all but very large business customers. Waivers obtained through negative option would not satisfy the Commission's section 222 requirement that carriers obtain express approval from customers to use CPNI for marketing purposes outside of the existing customer-carrier relationship.

Furthermore, assuming the Commission allows ILECs to rely on *Computer III* waivers, the Commission should clarify that BOCs may not transfer to affiliates CPNI obtained through a *Computer III* waiver. Historically, the Commission has prohibited the BOCs and GTE from sharing CPNI with affiliates unless the information is made available to competitors.[33] Section 272 essentially codified the Commission's long-held standard for the BOCs by noting that a BOC "may not discriminate between [the BOC's] affiliate and any other entity in the provision or procurement of goods, services, facilities, and information...."[34]

As indicated above, Intermedia urges the Commission to look to the letter of the Act and prevent discriminatory information – including CPNI – transfers to ILEC affiliates. However, to the extent that *Computer III* waivers remain valid, the Commission should retain

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32 *Id.* at ¶ 176.

33 47 C.F.R. § 64.702(d)(3).

34 47 U.S.C. § 272(c)(1).

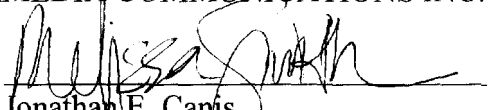
Computer III nondiscrimination requirements. Any other outcome would violate the Act, run contrary to the original *Computer III* waiver rules, and provide ILEC affiliates with an unfair competitive advantage over CLECs.

V. CONCLUSION

For the foregoing reasons, Intermedia submits that the Commission should reconsider its CPNI Order and rules as indicated herein to promote competition and to protect customer privacy.

Respectfully submitted,

INTERMEDIA COMMUNICATIONS INC.

By: 

Jonathan E. Canis
Melissa M. Smith
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036

Telephone: (202) 955-9664
Facsimile: (202) 955-9792

Its Counsel

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